82-202 NO.____

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

RAFAEL BEN-NATAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Fourth Amendment's guarantee that search warrants shall not issue except upon probable cause violated when the affidavit in support of the application for a search warrant contains material misrepresentations which render the warrant invalid?

2. Is the Fifth Amendment's right to be prosecuted by indictment, the Sixth Amendment's right to be informed of the nature and cause of the accusation, and the Fourteenth Amendment's guarantee of Due Process of law violated when the Government is permitted to prove a series of uncharged conspiracies upon the trial of an indictment charging a single conspiracy?

The petitioner Rafael Ben-Natan was indicted and charged in one count of a four-count indictment with the crime of conspiracy to import, distribute and to possess with intent to distribute, heroin.[1]

Petitioner was tried before the Honorable Henry Bramwell and a jury, and was found guilty of the single offense charged against him, viz., conspiracy to distribute heroin, and was sentenced to a term of imprisonment of fifteen years and to pay a fine of $25,000.00.

The petitioner was thereafter released on bail, pending appeal.

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1. The original indictment charged petitioner with the same offense and also charged Rafael Saadon and Gabriel Outmezguine with the same conspiracy and with three substantive counts of distribution of heroin.

A superseding indictment was filed charging petitioner with the same offense. Named as co-defendants in the new indictment were Rafael Saadon, Gabriel Outmezguine, Juliette Leinweber and Solomon Asseraf. Counts Two and Three of the superseding indictment, which charged Saadon and Outmezguine with distributing heroin on two separate occasions within the Southern District of New York, were dismissed prior to trial for lack of venue in the Eastern District of New York. Two other defendants, Juliette Leinweber and Solomon Asseraf, were named in Counts One and Four of the indictment (charging conspiracy and distribution, respectively). Leinweber was acquitted of both charges, and Asseraf was a fugitive at the time of trial.

The instant petition is from the aforesaid judgment of conviction, which was affirmed in a decision and order rendered by the United States Court of Appeals for the Second Circuit.[2]

2. The decision of the Court of Appeals was not officially reported.

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SUPREME COURT OF THE UNITED STATES
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RAFAEL BEN-NATAN,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Ben-Natal hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of conviction entered against him in the United States District Court for the Eastern District of New York.

ORDER BELOW

A memorandum opinion and order were rendered by the United States Court of Appeals for the Second Circuit and are set forth in the Appendix as "Appendix A."

Counsel for the petitioner was retained to submit the instant petition subsequent to the decision of the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals affirming Petitioner's conviction was dated and entered on June 4, 1982. Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL AMENDMENTS INVOLVED

AMENDMENT 4

Unreasonable searches and seizures.
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused.
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT 14

Section 1. Citizens of the United States.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

21 U.S.C. §846. *Attempt and conspiracy*

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. §841. *Prohibited acts A*
Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

REASONS FOR GRANTING THE WRIT

The petitioner contends that at his trial the Government introduced evidence derived as a result of a search and seizure carried out pursuant to a search warrant which was issued upon an affidavit containing material misrepresentations which rendered the warrant invalid. Accordingly, the search warrant was not issued upon probable cause, and the search that ensued violated petitioner's Fourth Amendment right to be secure in his papers and effects from an unreasonable search and seizure as guaranteed under the Fourth Amendment to the United States Constitution.

The petitioner also asserts that at his trial upon a single charge of conspiracy, the prosecutor was permitted to adduce proof concerning additional, uncharged conspiracies. This offended petitioner's rights to be prosecuted upon an indictment to be informed of the nature and cause of the accusation and his right to due process of law as guaranteed to him under the Fifth, Sixth and Fourteenth Amendments respectively, to the United States Constitution.

STATEMENT OF THE CASE

A. THE INDICTMENT

The indictment charged the petitioner with a single count of conspiracy to violate the narcotics laws. As charged, the conspiracy encompassed at least three separate unlawful objects, viz., *importation* of heroin from abroad, possession and *distribution* of heroin and finally, possession of substantial amounts of United States currency for the purpose of *purchasing* large quantities of heroin.

B. THE TRIAL

At the core of the Government's case was Marcel Atties, a paid informer whose services were enlisted to gather evidence about, and to prove, this conspiracy.

Atties was a French citizen who, after several years of travelling back and forth from France to the United States for no apparent reason, decided in early 1981 to become an informant for the DEA.

Atties first met James Kibble, the DEA case agent assigned in this matter, in early February, 1981. Atties claimed that prior to meeting with Kibble, he had never had any dealings with heroin, although he had told Kibble at the first meeting that he knew, and could introduce Kibble to drug dealers. Atties also stated that he had made himself a reputation as a drug dealer.

After his initial meeting with Kibble, Atties set about attempting to obtain drugs from petitioner's co-defendant, Gabriel Outmezguine, whom he knew to be a drug addict, and whom he guessed was a drug dealer.

On February 9, Atties met with Outmezguine and made an offer to import five to seven kilograms of heroin from France; Outmezguine expressed an interest in such a

deal. Atties also discussed purchasing small amounts of heroin.

Later, Gabriel Outmezgiune and Atties met the co-defendant Rafael Saadon at a restaurant in Manhattan. They discussed the deal for purchasing a small amount of heroin that had been made, and also, the deal concerning the importation of five to seven kilograms of heroin. About a week later, Atties purchased four ounces of heroin from Saadon and Outmezguine.

In the meantime, Atties also introduced Kibble to Solomon Asseraf, (also named as a co-defendant) Atties' nephew, for the purpose of purchasing heroin.

Asseraf told Kibble and Atties to follow him to Queens Boulevard in Queens County to meet the people who had the heroin. They went in separate cars to Queens Boulevard in front of an Alexanders Department Store where a purchase of two ounces of heroin was consummated.

On May 8, Atties, who had travelled to France, from where he had maintained contact with Outmezgiune and Saadon through the DEA office in New York, returned and met Outmezgiune and Saadon in the Taft Hotel in Manhattan. They asked for samples of the heroin, which Atties agreed to provide.

At this juncture, another undercover agent, William Ward, entered the picture, posing as the importer of the heroin from France. Ward supplied Atties with two grams of pure, undiluted heroin.

Atties told Outmezguine and Saadon that his source (Agent Ward) wanted to see the money that would be used to purchase the large quantity of heroin, and all four men travelled to Queens on the morning of May 11, ostensibly to view the money. However, suspecting that they were being followed, they did not go to the bank.

On the next day, May 12, desirous of keeping the deal alive, Atties met with Saadon inside a restaurant in

Manhattan. At the same time, Special Agent Mella, who was stationed in a surveillance van on the street, opposite the restaurant, saw petitioner standing alone, beside Saadon's car. Later, Agent Mella saw Outmezgiune and Saadon return to this same car, and together with petitioner, they drove off. Atties was growing impatient and after one or two further conversations, it was agreed to meet the next day, May 13, in front of the Alexanders store in Queens.

Atties went to Alexanders at about 9:00 the next morning. He met Outmezgiune, Saadon and the petitioner, whom he had never seen before. After a meeting at a coffee shop, Saadon and Atties went to the Manufacturers Hanover Trust Company Bank and Saadon displayed the contents of three safe deposit boxes containing substantial amounts of money.

After Atties left Saadon at the bank on the morning of May 13, he called the DEA and furnished the numbers of three safe deposit boxes—1106, 1051, and 1024. The agents learned from a bank employee that the safe deposit boxes with numbers 1106, 1051 and 1024 belonged to Saadon and petitioner and that two other persons, Nuriel Outmezgiune[3] and Juliette Leinweber also rented safety deposit boxes—1081 and 1031—at that branch.

With this information, Special Agent Kibble applied for and was issued a warrant to search all five safe deposit boxes. The ensuing search coupled with information obtained from the bank records pertaining to the safe deposit boxes reflected the following:

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3. Co-defendant Outmezgiune's relative.

Box No.	*Lessee*	*Amount Seized*
1106	Saadon Petitioner*	$70,000
1051	Saadon	$77,000
1024	Petitioner	$90,000
1081	Nuriel Outmezguine Juliet Leinweber*	$129,000 2,958 (British Pounds)

*Held Powers of Attorney in Boxes.

Later that day, the defendants, including petitioner, were arrested.

B. PETITIONER'S MOTION TO SUPPRESS

Prior to trial, petitioner moved to suppress the contents of the safe deposit boxes that had been searched pursuant to the warrant. The basis for the application was that Agent Kibble's affidavit in support of the warrant contained material misrepresentations that were made knowingly and deliberately or recklessly. Since Kibble had been an active and constant participant in the entire operation from February until May 1981, the misrepresentation clearly assumed far greater meaning than they might have, had Kibble merely investigated the case by relying on reports and additional information conveyed by others.

The affidavit was willfully or recklessly inaccurate in at least several material respects. Kibble recited that Atties had been shown the contents of three bank safe deposit boxes by Saadon when in fact, defense investigation and the testimony of a bank employee unequivocally established that Saadon only requisitioned and opened his own two boxes on May 13. Kibble further recited that Atties observed $455,000.00 in cash *which he counted,* as well as gold and jewelry, notwithstanding the fact that it

was entirely clear to Kibble that Atties was in the bank for no more than two to three minutes plainly rendering the counting of such a large sum of currency impossible. Kibble also averred that petitioner was waiting outside the bank while Saadon was showing Atties the money, although this was not true as Kibble and his fellow, surveilling agents well knew. Finally, to the extent that the facts recited in the supporting affidavit were not within Kibble's personal knowledge, the affidavit contained not a single statement showing or even tending to show that any information derived from the informant was in any way reliable or trustworthy.

The District Court denied petitioner a hearing on his motion to suppress, and found that even discrediting the statements attacked by petitioner as intentionally or recklessly false, the affidavit alleged sufficient facts to warrant a finding of probable cause.

POINT I

THE DISTRICT COURT ERRED IN DENYING PETITIONER A HEARING ON HIS MOTION TO SUPPRESS AND IN FINDING THAT THE SEARCH WARRANT AS IT PERTAINED TO HIS SAFE DEPOSIT BOX HAD ISSUED UPON PROBABLE CAUSE.

In *Franks v. Delaware*, 438 U.S. 154 (1978) this Court held that where a defendant makes a substantial preliminary showing that the affiant in an affidavit in support of a search warrant has knowingly made intentionally or recklessly false representations therein, the Fourth Amendment requires that a hearing be held at the request of an accused. Petitioner made this requisite showing before the District Court, but was not permitted to establish his claim of perjury or reckless disregard on the

part of the affiant at a hearing. Instead, the trial court found that even accepting petitioner's attack on the warrant, setting aside the material alleged to have been false, there was probable cause to issue a search warrant which was directed, in part, to the contents of petitioner's safe deposit box.

We respectfully submit that in a case such as this where the affiant is, himself, a law enforcement officer who participated actively and regularly in the criminal transaction together with a paid informant, the procedure articulated in *Franks v. Delaware, supra,* of setting aside portions of the warrant affidavit and then determining whether the remaining contents support a finding of probable cause does not fully ensure the integrity of the judicial system.

The facts that distinguish *Franks v. Delaware, supra,* from the instant case were that in *Franks* law enforcement personnel submitted a sworn affidavit whose contents were based upon information obtained from other individuals rather than upon the officers' own direct participation or surveillance of the underlying offense. The claimed bad faith, deliberate or reckless misstatements pertained essentially to the manner in which the officers obtained the information, not to the very truth or falsity of the information itself. In such circumstances, a suppression court could disregard the untruthful statements and go on to decide the question of whether without such statements, the affidavit contained sufficient facts to support a finding of probable cause.

In petitioner's case the DEA agent's knowing and willful or reckless misrepresentations cannot and should not simply have been put aside while the court considered the remaining portions of the affidavit on the issue of the existence of probable cause. Nearly all the facts recited in the warrant affidavit were within Agent Kibble's own personal knowledge which was based upon his active par-

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In petitioner's case the DEA agent's knowing and willful or reckless misrepresentations cannot and should not simply have been put aside while the court considered the remaining portions of the affidavit on the issue of the existence of probable cause. Nearly all the facts recited in the warrant affidavit were within Agent Kibble's own personal knowledge which was based upon his active par-

ticipation in the ongoing operation. The remaining information was derived from fellow DEA agents or from the informant, Atties, whose reliability and credibility were nowhere set forth, contrary to *Aguilar v. Texas*, 378 U.S. 108 (1964). Any misrepresentaitons could only have been the result of Agent Kibble's own knowing and willful or reckless misstatements, the result of the informant's making knowing and willful representations to Kibble or the informant's knowingly withholding material information.

In such circumstances, material misrepresentations impair the integrity of the entire affidavit, rendering the warrant invalid, and the fruits of search conducted thereunder should be excluded from evidence. Any lesser sanction would permit law enforcement personnel to submit affidavits in support of search warrants, knowing that they contained deliberately or recklessly false information which would either not be challenged at all or attacked and then, at worst, be disregarded.

Where the challenged misrepresentations pertain directly to the truth or validity of information that is offered in support of a finding of probable cause, rather than merely to its source or weight, the courts should be loath to accept for further consideration, a warrant affidavit known to contain such deliberate or reckless falsehoods. To proceed to adjudicate the issue of probable cause in such circumstances for the affiant seeking a search warrant, the courts would tacitly be lending their approval to the applicant's dishonest design.

Accordingly, under such facts, the exclusionary rule enumerated in *Weeks v. United States*, 232 U.S. 383 (1914) and re-affirmed in *Franks v. Delaware, supra*, should be applied.

POINT II

THERE WAS A MATERIAL VARIANCE BETWEEN THE SINGLE CONSPIRACY CHARGED IN THE INDICTMENT AND THE MULTIPLE CONSPIRACIES PROVEN AT THE TRIAL AND PETITIONER SUFFERED SUBSTANTIAL PREJUDICE.

The indictment charged petitioner and his four co-defendants with a single conspiracy to import, distribute and purchase heroin from February 1, 1981 through May 13, 1981.

The Government proved at least two, separate and distinct conspiracies, thereby violating petitioner's rights under the Fifth, Sixth and Fourteenth Amendments. The first conspiracy, characterized as "Phase I" by Agent Pavelick consisted of the sale of heroin amounting in total to approximately eight ounces by co-defendants Asseraf, Saadon and Outmezguine to DEA agents. These sales took place on February 6, 9, 12, 18 and 19, 1981. The petitioner was in no way tied to any of these transactions.

On May 8, 1981, after the informer, Atties, returned from France, the DEA initiated a reverse undercover buy operation, Phase II, whereby heroin would be sold to co-defendants Saadon and Outmezguine for approximately $600,000.00.

To tie petitioner to this second conspiracy, the Government relied principally upon approximately $90,000.00 contained in a safe deposit box in his name which was "flashed" by co-defendant Saadon to Atties after Atties had demanded to see the "buy money" at the bank with Saadon. None of this money was ever proved to have originated from "Phase I" or any other drug transaction

Ironically, in its brief to the Court of Appeals, the Government actually urged:

> While it may be rare in a single case for the jury to hear evidence of both aspects of a distribution scheme, this is only because such conspiracies are normally proved through witnesses privy to one part of the scheme, and not because more than one conspiracy exists. (plural emphasis supplied)

Covering all bases, the Government, in its brief below further contended:

> Additionally, even where more than one conspiracy is proved, such a variance constitutes reversible error only when substantial rights are affected.

Even the Government appreciated the problem it had engendered by indicting and trying petitioner as it did.

Plainly, there was no evidence linking the petitioner with the co-defendants in this case. Nevertheless, the Government subjected petitioner to voluminous testimony relating to unconnected crimes in which he took no part. See, *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975). See also, *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974).

There are additional compelling considerations leading to a conclusion that there were at least two independent conspiracies in this case. There was a complete disparity of objectives between "Phase" I and "Phase" II. There was no proof of knowledge on the part of the petitioner, of the intimate details of the various operations, nor was there evidence concerning cooperation or mutual dependence among petitioner and the co-defendants. cf. *United States v. Tramunti*, 513 F.2d 1087 (2d Cir. 1975); cf., also, *United States v. Moten*, 564 F.2d 620 (2d Cir. 1977).

Unquestionably, petitioner suffered a tremendous spillover effect when proof concerning "Phase" I was of-

fered against him, and the prejudice was substantial. See, *Kotteakos v. United States*, 328 U.S. 750 (1946); See also, *United States v. Cambindo Valencia*, 609 F.2d 603 (2d Cir.), cert. denied 446 U.S. 940 (1980).

The issue of material, prejudicial variance has arisen with continuing frequency in the Second Circuit as that Court's opinions disclose[4] and we respectfully submit, is an issue to which this Court should address itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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4. Compare Judge Timbers' admonition in *Sperling*, *supra*, at p. 1340 with Judge Van Graafeiland's statement in *Bertolotti*, *supra*, at p. 151.